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NO. 81-2332

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN GAS ASSOCIATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 36, the American Gas Association (A.G.A.) hereby respectfully requests permission to file its brief *amicus curiae* in support of the Respondent in the above-captioned case. This motion is necessary because while Respondent granted permission for A.G.A. to file its brief, the Petitioner declined to grant its consent.

A.G.A. is the national trade association for approximately 250 member companies providing natural gas transmission and distribution services to over 160 million consumers. These companies are affected greatly by urban redevelopment projects such as that implemented by the Norfolk Redevelopment and Housing Authority (NRHA), which require the relocation of transmission facilities.

This case presents issues of statutory interpretation the resolution of which will determine whether the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601-4655 (URA) provides relief in

the form of reimbursement to utilities forced to relocate lines as a result of these projects.

A.G.A. submits that, at least under the circumstances in this case, the URA does provide *limited* relief. We stress the limited aspect of this relief because of Petitioner's contentions that allowing reimbursement here will have a harsh and adverse nationwide impact.

The provisions of the URA apply in only limited circumstances. For instance, a utility which relocates as a result of any project that does not require an acquisition of property, such as a sewer construction or highway reconstruction project, could not come within the provisions of the act. Further, under the laws of some states, utility lines, once in place, are not considered the "personal property" of the company; thus, upon relocation the utility will not be moving its "personal property," as required by the statute. *See* 42 U.S.C. 4601(6). Consequently, allowing reimbursement here will not affect every federally-funded project in the nation.

Further, because the public utilities involved in these activities are generally regulated, the ultimate question here is whether relocation costs are to be borne by the utilities customers alone or by the taxpayers in general (the two groups do not always coincide). The failure to reimburse utility relocation costs will impose an inequitable burden on ratepayers, especially the poor and elderly who are least able to pay these costs.

A.G.A. is not asking, nor do its members expect, reimbursement of costs for every relocation undertaken as a result of a federally-funded project. Moreover, we do not believe that the URA covers every such displacement. A.G.A. submits, however, that the facts of this case, taken in light of the plain language of the URA, mandate allowance of relocations cost in this instance.

WHEREFORE, the American Gas Association respectfully moves that this Court grant permission to file its brief

amicus curiae, attached hereto, in support of the position of the Respondent.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE AMERICAN GAS ASSOCIATION

I. INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* in support of the Respondent is submitted by the American Gas Association (A.G.A.), a non-stock, non-profit corporation organized under the laws of the state of Delaware. A.G.A. is the national trade association for approximately 250 member companies providing natural gas transmission and distribution services to over 160 million consumers. The member companies of A.G.A. provide approximately 85 percent of the nation's natural gas utility sales and 43 percent of the total energy consumed in the United States by residential and commercial establishments.

The member companies of A.G.A. are affected greatly by urban redevelopment projects such as that implemented by the Norfolk Redevelopment and Housing Authority (NRHA)

in the city of Norfolk, Virginia. Utilities must relocate not only when street patterns will be changed and existing rights-of-way altered, as here, but for projects requiring excavation near and around gas mains, such as sewer construction and road reconstruction. In most cases,[1] such relocation is done solely at the cost of the utility, and ultimately, its ratepayers.

The Uniform Relocation and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601-4655 (1976) (URA), however, provides limited relief to utilities affected by such projects. We stress the limited aspect of this relief because of Petitioner's contentions that allowing reimbursement in this case will have a harsh and adverse nationwide impact. This is simply not true.

As we will show in more detail *infra*, the provisions of the URA apply in only limited circumstances. These circumstances, however, are present in only a small percentage of the relocations that utilities are forced to implement every year. For instance, a utility that relocates as a result of any project not requiring an acquisition of property, such as a sewer construction or highway reconstruction project, could not come within the provisions of the act.[2] Further, under the laws of some states,[3] utility lines, once in place, are not considered the "personal property" of the company; thus, upon relocation the utility will not be moving its "personal property," as required by the statute. *See* 42 U.S.C. 4601(6). Consequently, allowing reimbursement here will not affect every

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[1] Certain acts of Congress, *see* n.11 *infra*, provide for reimbursement of utility relocation costs, and in some states, limited reimbursement is allowed. *See, e.g.* City of Center Line v. Michigan Bell Telephone Company, 26 Mich. App. 655, 182 N.W.2d 769 (1970), *aff'd*, 387 Mich. 360, 196 N.W.2d 144 (1972); Mich. Stat. Ann. §5.3501 (Callaghan 1969).

[2] *See Consumers Power Co.* v. *Costle*, 615 F.2d 1147 (6th Cir. 1980) (where sewer construction project did not require acquisition of land, gas company cannot recover under URA).

[3] In Michigan and New York, for example, a special franchise or consent granted by the state or a municipality to a utility company to place, maintain and operate its facilities in public streets represents an interest in real property. Upon relocation, a utility would not be relinquishing this interest because there is no right to a *fixed location* in the public streets. *See Consumers Power*, 615 F.2d at 1149.

federally-funded project in the nation. Because the utilities will be reimbursed by federal and local authorities in proportion to that share of the total project cost borne by each, the fear that "[a]lready strained municipal budgets will be further impacted [*sic*] by the unexpected payments."[4]

All utilities have an interest in keeping the costs of service to their customers as low as possible. Because the public utilities involved in these activities are generally regulated, the ultimate question here is whether relocation costs are to be borne by the utilities' customers alone or by the taxpayers in general (the two groups do not always coincide). The failure to reimburse utility relocation costs will impose an inequitable burden on ratepayers, especially the poor and elderly who are least able to pay these costs. As the Department of Housing and Urban Development noted in its Petition in Opposition to Certiorari at 6, "[i]t is reasonable to include all the expenses of redevelopment projects in the cost of the project itself, rather than to pass along some of these expenses to the utility's customers, in what amounts to a hidden tax." Thus, at least in the limited circumstances under which the URA allows reimbursement of these costs, utility customers alone will not be forced to bear the costs of projects which benefit the community as a whole.[5]

A.G.A. is not asking, nor do its members expect, reimbursement of costs for every relocation undertaken as a result of a federally-funded project. Moreover, we do not believe that the URA covers every such displacement. A.G.A. submits, however, that the facts of this case, taken in light of the plain language of the URA, mandate allowance of relocation costs in this instance.

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[4] Brief of Petitioner at 40.

[5] In fact, the legislative history of the URA supports the proposition that "the few should not be made to pay unfairly for the progress that will benefit the many." 116 CONG. REC. 40170 (1970) (Remarks of Representative Johnson).

II. STATEMENT OF THE CASE

Respondent Chesapeake and Potomac Telephone Company of Virginia (C&P) brought suit in the U.S. District for the Eastern District of Virginia against Norfolk Redevelopment and Housing Authority (NRHA) and the Secretary of Housing and Urban Development (HUD) seeking reimbursement for the relocation of its telephone lines, cables, conduits, and related equipment, which was necessitated by federally-aided redevelopment projects in Norfolk, Virginia. The basis for the claims was the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, which provides that "[w]henever the acquisition of real property for a [federally assisted] project . . . will result in the displacement of any [individual or corporation]", such displaced person shall be paid the "actual reasonable expenses in moving [the individual's or corporation's] personal property . . ." 42 U.S.C. §§4622(a)(1) and 4601(5) and (6).

The district court denied relief, holding that public utilities were not included within the reimbursement provisions of the Act. This conclusion was based on the common law rule that utilities must relocate at their own cost when directed by public authorities to move property from public rights-of-way. The court found nothing in the Act or its legislative history to show that Congress intended to change this rule. The court also noted that utilities can retrieve these costs through their rate structures.

The United States Court of Appeals for the Fourth Circuit reversed this ruling and remanded for further proceedings. The court rejected the common law argument, finding that the Act's plain language would apply in the absence of any clear legislative intent to exclude utilities. The court then determined that C&P met the statutory requirements for a "displaced person" and accordingly ruled that C&P was entitled to reimbursement of its relocation costs.[6] NRHA then filed its Petition for Certiorari in this Court.[7]

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[6]Some expenses were incurred with respect to lines in streets that were widened, and others in streets that were only partially closed. On remand, the district court was directed to determine whether these costs were covered by the Act.

[7]HUD, after entering a financial settlement with NRHA regarding the projects involved here, filed a petition opposing the grant of certiorari.

III. ARGUMENT

A. THIS COURT NEED NOT DECIDE WHETHER THE URA CHANGES THE TRADITIONAL COMMON LAW RULE REGARDING UTILITY RELOCATIONS BECAUSE THE COMMON LAW WOULD NOT APPLY IN THIS CASE EVEN ABSENT THE URA.

It is not disputed that the traditional common law rule requires a utility to relocate, at its own expense, its facilities located within public rights-of-way. *See New Orleans Gas Light Co.* v. *Drainage Commission of New Orleans*, 197 U.S. 453 (1905); *Potomac Electric Power Co.* v. *Fugate*, 211 Va. 745, 180 S.E.2d 657 (1971). The power to require utility relocation of its lines is based, ultimately, on the public nature of the streets in which the city holds a public easement; thus the utility's interest in the public way is subordinate to the public's enjoyment of it. *Port of New York Authority* v. *Hackensack Water Co.*, 195 A.2d 1,4 (N.J. 1963). By extension, then, if there is no public right-of-way over land in which the utility has placed its lines, there is no power in the public authority to require the utility to relocate solely at its own cost.[8]

In the present case, C&P did not move its facilities from a public right-of-way. The lines were moved from land which NRHA acquired in fee simple absolute, free from the public right-of-way which previously encumbered it. *Chesapeake & Potomac Telephone Company* v. *Landrieu*, 674 F.2d 298, 301 (4th Cir. 1982). When NRHA, like any other purchaser under Virginia law, acquired a parcel of land abutting a public right-of-way, it also acquired the underlying fee in that right-of-way extending out to its center line, but subject to the public easement for use and travel; when parcels across the street

[8] In some cases, even where there is a public right-of-way, the utility will not have to bear all relocation costs. For instance, in Baltimore v. Baltimore Gas & Electric Co., 232 Md. 123, 192 A.2d 87 (1963), the court held the traditional rule inapplicable where the relocation of facilities was necessitated by the municipality's exercise of a proprietary rather than a government function.

from each other were acquired, NRHA acquired the entire fee. 674 F.2d at 301. When these acquisitions were completed, NRHA filed petitions with the Norfolk City Council requesting that the affected streets be closed; once the street closing ordinances were adopted, the public easement for use and travel was extinguished. *Id.* Because C&P did not remove its lines until after the streets were closed to the public, it did not "remove its distribution facilities from public rights of way."[9]

Thus, the crucial element upon which the city's power under the common law to require relocation depends – the public right-of-way – was not present once the easement was extinguished. Consequently, the common law rule is inapplicable under the facts of this case, regardless of whether Congress "intended" that the URA change it.

B. ABSENT CLEAR LEGISLATIVE INTENT TO THE CONTRARY, A COURT MUST APPLY THE PLAIN LANGUAGE OF A STATUTE; HERE, C&P MEETS ALL STATUTORY REQUIREMENTS TO QUALIFY AS A "DISPLACED PERSON."

1. *There is no indication of an intent to exclude utilities from URA coverage.*

As the court of appeals below correctly noted, "in the absence of any *clear* legislative intent to exclude utilities, it is this court's duty to apply the literal language of the [URA]." 674 F.2d at 298 (emphasis added). While Petitioner cites other acts of Congress[10] in an attempt to show what the legislature

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[9] *See* Respondent's Brief in Opposition to Certiorari at 5. A.G.A. supports C&P's contention that Petitioner has misstated the question presented for this reason.

[10] Specifically, the Federal-Aid Highway Act of 1956, 23 U.S.C. §123 (1976), as amended, and the District of Columbia Public Utilities Reimbursement Act of 1972 (DCPURA), Pub. L. No. 92-495, 86 Stat. 812 (1972). The Highway Act allows reimbursement for relocations resulting from interstate highway construction and the DCPURA allows reimbursement in the District of Columbia without regard to federal financial participation and regardless of whether there has been an "acquisition."

did not intend when enacting the URA, this effort is unconvincing. Even in the best of circumstances, it is difficult to ascertain congressional "intent" when confronted with statutory interpretation. Reliance on the provisions and legislative history of other acts dealing with different subject-matter adds nothing to the determination at issue here, particularly when one can cite the same provisions and history and arrive at precisely the opposite conclusions.[11]

The purpose of the URA as stated in its Declaration of Policy, is to

> establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and Federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.

42 U.S.C. §4621. Petitioner has not produced any legislative history that *specifically* indicates a congressional intent to exclude utilities from the provisions of the URA. Given its stated purpose and the lack of evidence to the contrary, Congress' failure to mention utilities "provides little reason to exclude [them] from the Acts coverage." 674 F.2d at 300.

2. ***C&P moved its personal property as a result of the NRHA acquisition.***

The URA defines "displaced person" as any person

> who moves from real property, as a result of the acquisition of such real property, in whole or in part . . . for a program or project undertaken by a Federal agency, or with Federal financial assistance; . . .

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[11] Indeed, as HUD noted with regard to the DCPURA, these Acts indicate that Congress wanted utilities to be reimbursed. *See* HUD Brief in Opposition to Certiorari at 6 n.3.

42 U.S.C. §4601(6). The term "person" means individuals, partnerships, corporations or associations. 42 U.S.C. §4601(5).

Petitioner claims that C&P does not qualify under this definition. Specifically, NRHA contends, first, that the facilities involved in this relocation are real rather than personal property, and, second, that C&P did not move "as a result of the acquisition of land."[12] It is our position that NRHA is wrong on both points.

HUD regulations require that to determine what qualifies as personal property, one must refer to the law of the state in which the property is located.[13] NRHA relies on *Transcontinental Gas Pipe Line Co.* v. *Prince William County*, 210 Va. 55, 172 S.E.2d 757 (1970) for the proposition that utility lines are realty, rather than personalty. Reliance on this case, however, is misplaced.

The court in *Transco* relied on the general rule that the intention of the party is the chief test to be considered in determining whether a chattel has been converted to a fixture and thus a part of the realty. 210 Va. at 55. Other considerations are annexation of the property to the realty, and adaptation to the use or purpose to which that part of the realty with which the property is connected is appropriated.[14] 210 Va. at 555. Intent, however, is paramount and controlling. *Danville Holding Corp.* v. *Clement*, 178 Va. 223, 232, 16 S.E.2d 345, 349 (1941).

In *Transco*, the company had installed gas pipelines in land in which it had acquired permanent rights-of-way and a

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[12] Brief of Petitioner at 32-39.

[13] 24 C.F.R. §42.40(m)(2).

[14] Clearly in this case C&P annexed its lines and conduits to the realty. Contrary to NRHA's contention, however, *see* Brief of Petitioner at 33, the lines were not adapted to the use or purpose of the land to which they were attached; the presence of utility lines neither contributes to nor detracts from the use or purpose of a street. *See* Bangor-Hydro Electric v. Johnson, 226 A.2d 371, 377 (Me. 1967) (utility poles within limits of public highway establish no adaptation to use of highway and neither contribute to its purpose nor bring about joinder with highway in common enterprise).

perpetual easement from the fee simple owners. 210 Va. at 552. This property interest in the land was crucial to the court's determination that the lines were real rather than personal property, as evidenced by its citing *City of Newport News* v. *Warwick County*, 159 Va. 571, 166 S.E. 570 (1932) as controlling. The *Newport News* court held that where a city owned and operated a system of waterworks in a county, the mains located beneath public highways *in which the city held easements*, constituted fixtures upon the land. 159 Va. at 601-03, 166 S.E. at 581. Thus, where there is a real property interest held by the owner of the lines, it is more likely that the owner intended that the lines become part of that realty. Here, C&P holds no real property interest or easement in the streets in which it maintains its lines. Consequently, it could hardly have extended them to be so affixed as to become the property of others who actually owned the land.[15]

Further, the intent to make a chattel a permanent annexation to realty most affirmatively and plainly appear in order to convert it into a fixture; if the matter is left in doubt and uncertain, the legal qualities of the article are not changed, and it must be deemed a chattel. *Mullins* v. *Sturgill*, 192 Va. 653, 66 S.E.2d 483 (1951). Under these circumstances, then, it cannot be said that C&P "affirmatively and plainly" intended its lines to become fixtures. Otherwise, C&P would have no right to remove them.

NRHA also contends that C&P did not remove its lines "as a result of the acquisition of such real property," as required by the Act, *see* 42 U.S.C. §4601(6), but that it moved its facilities because of the requirements of the franchise. Petitioner's arguments on this point are unpersuasive.

It is undisputed that NRHA acquired the land from which C&P moved. The acquisition was in furtherance of a federally-

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[15] *See also* United Electric Light v. Deliso Const. Co., 52 N.E.2d 553, 556 (Mass. 1943) (utility equipment installed in *public* way under permits granted by city did not become part of realty, but was company's personal property, which remained in its custody and possession) (emphasis added).

assisted project, and *but for* the acquisition of the land under the streets, C&P would not have had to relocate.[16] This is clearly a relocation as a result of an acquisition, and whether C&P moved pursuant to its franchise is irrelevant under the language of the statute. The closing of streets was done by the city at NRHA's request, and these closings would not have been necessary had it not been for the urban renewal project.

CONCLUSION

The claims for which C&P seeks reimbursement are within the purview of the URA. We stress again the limited nature of the relief provided for utilities under that act, and wish to dispel fears that a ruling in C&P's favor will adversely affect state and municipal programs receiving federal assistance.

The court below proceeded in accordance with established rules of statutory construction and its ruling is equitable and within the plain language and purpose of the URA. The decision of the court of appeals should be affirmed.

Respectfully submitted,

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[16] The same reasoning would apply to tenants and owners of buildings on the land acquired by NRHA. Their relocation is the result of the acquisition. To use a different standard for utilities similarly affected would not comport with the purpose of the URA, which is to provide for the "*fair and equitable* treatment of persons displaced" by such projects. 42 U.S.C. §4621 (emphasis added).